SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 71

MINE SAFETY APPLIANCES COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

W. DENNING STEWART,
HOWARD ZACHARIAS,
CHARLES EFFINGER SMOOT,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23,387

MINE SAFETY APPLIANCES COMPANY,
Plaintiff,

vs.

JAMES V. FORRESTAL,
Defendant.

STATEMENT AS TO JURISDICTION

The basis upon which it is respectfully contended that there is jurisdiction on appeal in the Supreme Court of the United States to review the order entered in the District Court of the United States for the District of Columbia on April 9, 1945, is as follows:

I

Jurisdiction of the Supreme Court

The statute believed to sustain the jurisdiction of the Court is the Act of Congress of August 24, 1937, 28 U. S. C. 380(a), 50 Stat. 751, Section 3. Jurisdiction was so recognized by this Court in *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *Coffman* v. *Breeze Corporation*, No. 71, October Term, 1944, 89 L. ed. Advance Opinions 255 and by analogy, *Sterling* v. *Constantin*, 287 U. S. 378 (1932) and *Herkness* v. *Irion*, 278 U. S. 92 (1928).

II

The Court Below Had Jurisdiction

That the Court below had jurisdiction as a Court of Equity is sustained by *Stark* v. *Wickard*, 321 U. S. 288

(1944). That the Court below had jurisdiction to determine whether the defendant was liable under the facts is sustained by *Illinois Central R. Co. v. Adams*, 180 U. S. 28 (1901); *Brewery Co.* v. *Moore*, 262 F. 582 (D. C. Mo.) (1919). The lower court had jurisdiction of the declaratory judgment feature: *Curtin* v. *Wallace*, 306 U. S. 1 (1939).

III

Statutes Involved In This Proceeding

The statutes of the United States, the validity of which are involved, are:

Section 403 of the Act of April 28, 1942, as amended October 21, 1942, July 1, 1943 and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Title 50, Appendix 1191), said statute is now known as the 1942 Renegotiation Act; and

Section 403 (a)(4)(C); (a)(4)(D); (e); (i)(1)(D); (i)-(1)(F) and (i)(3) as amended by Section 701 (b) of the Act of February 25, 1944 (58 Stat. 78-92), now known as the 1943 Renegotiation Act. (Note: The 1943 Renegotiation Act—without the so-called 1942 Renegotiation Act—is now printed in the United States Code Annotated, but the "1943" Act is not pertinent to this case except for the sub-sections indicated above.)

The material provisions of the statutes are set forth in the Appendix infra pp. 22-30.

IV

Date of Decree and Application for Appeal

The order of the aforesaid District Court granting the defendant's motion and dismissing the plaintiff's complaint was signed, filed and docketed under date of April 9,

1945, and the application for appeal herein is presented April 27, 1945.

V

Nature of the Case

This case was heard below by a Three-Judge Court constituted under the Act of August 24, 1937, 50 Stat. 751, Section 3, 28 U. S. C. 380(a), the principal questions raised by the complaint itself and as applied to this case being the constitutionality of the Renegotiation Statute, hereinbefore mentioned and whether defendant had exceeded his statutory authority and was therefore acting illegally.

Under protest the appellant-plaintiff herein submitted to the procedure required by the Renegotiation Act with the result that on March 4, 1944, the defendant herein, purporting to act by delegation of authority to him, on behalf of the various other governmental departments (War, Treasury and Maritime Commission) interested in contracts with appellant-plaintiff, notified it in writing as follows:

"The Under Secretary of the Navy

Washington

March 4, 1944

Mine Safety Appliances Company
Pittsburgh
Pennsylvania

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

Gentlemen:

Renegotiation with respect to your contracts and subcontracts within the meaning of Section 403 of the Sixth Supplemental National Defense Appropriation Act,

1942, as amended, has been conducted between you and the Secretary of the Navy or his duly authorized representative or representatives. In connection with such renegotiation there were submitted by you or obtained from governmental or other reliable sources certain financial, operating and other data relating to your circumstances and operations and to the profits realized by you during your fiscal years ending December 31, 1941, and December 31, 1942, under such contracts and subcontracts. You have been afforded full opportunity, at hearings of which due notice was given and which you attended, to submit such additional information and to present such contentions as you deemed material to a determination whether any, and if so, what part, of such profits is excessive.

Due consideration has been given to all of such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all applicable factors pertinent to a determination of the existence and amount of excessive profits realized by you under such contracts and subcontracts for such periods. Such renegotiation has now been concluded and you have declined to enter into an agreement for the elimination of excessive profits realized during such periods from such contracts and subcontracts.

Accordingly, pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any refund or credit received by, or reduction in liability of,

Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the intent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods.

Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403.

Very truly yours,

(S.) JAMES FORRESTAL."

In order to prevent defendant from inflicting irreparable injury on it through the carrying out of his unilateral order and his threat to direct the withholding of amounts otherwise due appellant-plaintiff by the Government as contractor or subcontractor and by appellant-plaintiff's contractors, and to prevent defendant from interfering with the business relations between appellant-plaintiff and its customers, and to avoid a multiplicity of suits which would necessarily arise if its subcontractors refused to pay, appellant-plaintiff filed its complaint in the Court below on March 8, 1944, praying for a preliminary injunction to be made permanent on final hearing and for a declaratory judgment.

The complaint alleged facts establishing the unconstitutionality of the statute in question and further alleged facts which established that defendant was acting in excess of his

statutory authority in that he had included in renegotiable business of appellant-plaintiff, contracts which had been entered into, completed, and paid for, prior to the date of the statute and its amendments and which, by its express language, were not subject thereto. Only contracts not paid for in full prior to April 28, 1942 are subject to the statute (Sec. 403(c)(6).

The contracts here involved were in material part, entered into in 1941 and 1942, prior to April 28, 1942, the date of the statute, and the amendments of October 21, 1942 and July 14, 1943.

It is believed that "otherwise due" in the statute means that these amounts would be paid except for the unilateral order here involved.

The grounds upon which unconstitutionality of the statute rests are, inter alia,

(a) The statute vests in appointed executive and administrative officials authority to repudiate prior existing contracts between appellant-plaintiff and the United States and others and to pay for property acquired from appellant-plaintiff under such contracts, such prices therefor as in the opinion of these executive or administrative officers should be paid, the position of appellant-plaintiff being that since the Fifth Amendment guarantees payment of just compensation such a statute is a violation thereof.

(b) The statute authorizes by its retroactive provision, and the complaint alleges, the repudiation of prior valid existing contracts between appellant-plaintiff and the United States, in violation of the Fifth Amendment.

(c) The statute delegates to appointed executive and administrative officials and permits them in turn to redelegate ad infinitum unrestricted legislative and judicial functions without standards of any nature and therefore violates

Article I, Section 1, Article I, Section 8, Clause 18, and Article III, Section 1, of the Constitution of the United States.

(d) The statute in legal effect delegates to appointed executive and administrative officials the authority to impose a super excess profits tax on such persons as in their unrestrained opinions should pay such tax and in such amounts as in their unrestrained opinions should be paid.

(e) The statute undertakes to vest in biased executive agencies with whom appellant-plaintiff made its contracts, the right to repudiate those contracts and fix a price for appellant-plaintiff's property, which action violates the "due process" clause of the Fifth Amendment of the Constitution of the United States in that it makes it impossible for appellant-plaintiff to receive a fair hearing or the rudimentary right of fair play from an independent and impartial administrative agency.

(f) The statute undertakes to discriminate, without any reasonable basis therefor, against excessive profits from contracts with certain government agencies and authorizes the granting of such exemptions therefrom as the defendant and the appointed Boards, in their opinion, may see fit.

(g) The statute lacks due process and is unconstitutional from a procedural standpoint.

(h) The statute is by its terms, arbitrary and discriminatory.

The complaint further alleged that the statute was unconstitutionally applied on the basis of the following facts as averred in the complaint:

(i) In arriving at his unilateral order of March 4, 1944, facts were considered by defendant which were obtained from "governmental or other reliable sources" and appel-

lant-plaintiff was never apprised of these facts although request was made for such information.

(j) No facts were found to support the unilateral order and in fact, appellant-plaintiff was refused information as to how the defendant and his board arrived at their conclusions.

On March 9, 1944, after the complaint had been served, the parties to the litigation entered into the following stipulation, in lieu of a preliminary injunction:

"Stipulation Suspending Payment and Intermediate Action

It is hereby stipulated by and between plaintiff above-named and defendants above-named by their counsel duly authorized thereto as follows:

1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,000,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take

no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemd to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights.

MILLS AND KILPATRICK,
By (S.) CHARLES EFFINGER SMOOT,
(S.) W. DENNING STEWART,
Counsel for Plaintiff.
(S.) FRANCIS M. SHEA,
Asst. Atty. Gen.,
Counsel for Defendants.
3/9/44."

On June 12, 1944, the defendant filed his answer asserting legal and factual defenses, raising several issues of fact.

On December 8, 1944, defendant filed a motion to dismiss and for summary judgment and an affidavit in support thereof. The substance of the affidavit is that since defendant says he need not look any further than the vouchers on which payment has been suspended, he neither will nor can proceed to collect, by witholding or otherwise, any further sum from plaintiff on account of excessive profits realized during its fiscal years, 1941 and 1942. Plaintiff filed an answering affidavit denying certain of the averments of defendant's affidavit.

The court below (Justices Miller, Bailey and McGuire), upon consideration of the complaint, answer, and affidavits, without passing upon the constitutional issue or whether

defendant was acting in excess of his statutory authority, sustained one ground asserted in defendant's Motion to Dismiss, namely, that the Court lacked jurisdiction over the subject matter, the Court holding that the United States was the real party in interest because the effect of an injunction would be to require payment to appellant-plaintiff of the amounts due it on its contracts with the United States. Two opinions were filed. Appendix pp. 30-39. Mr. Justice Miller concurred in the opinion of Mr. Justice McGuire. Mr. Justice Bailey filed a separate opinion in which the other two Justices concurred.

VI

Substantial Nature of Questions Involved

As was well stated by the Circuit Court of Appeals for the Second Circuit in *Hoffman Brewing Company* v. *M'Elligott*, 259 F. 525, 527 (1919):

> "A Suit in equity to enjoin the United St es attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. In such a case the United States is sued as effectively as if it were a defendant by name. There is however, a well-recognized exception to the rule, viz. if property rights are invaded, and the statute in question is unconstitutional, it is void, is to be treated as nonexistent, and so no defense to the United States atttorney. When instituting criminal proceedings under it he is to be regarded not as representing the United States in his official capacity, but as acting individually. So if, under a valid statute, he threatens to proceed in a manner injurious to complainant's property rights, and not authorized by statute, he transcends his authority, does not represent the United States, is not protected by the statute, and may be enjoined. Irreparable injury alone is not enough. Both these conditions must exist. Obviously in such

cases the constitutionality of the statute, or the question whether the United States attorney has transcended his authority, must be determined by the court before it can determine whether the particular suit is or is not against the United States."

To the same effect are—

State of Oklahoma ex rel Phillips v. *Atkinson Co.*, 37 Ged. Supp. 93 Aff. 313 U. S. 508 (1941);

Obrecht-Lynch Corp. v. *Clark*, (D. C. Md.) 30 F. (2d) 144, 146 (1929);

Franklin Township v. *Tugwell* (App. D. C.) 85 F. (2d) 208, 229 (1936);

Hammond-Knowlton v. *United States* (C. C. A. 2d) 121 F. (2d) 192; Cert denied 314 U. S. 694 (1941).

This sound principle of law is ignored by the Court below and its opinion, we believe, obviously begs the real question at issue.

If the statute be unconstitutional or the defendant is acting in excess of his statutory authority then he had no official status and cannot claim the immunity of the sovereign. It is of no moment that defendant has no personal interest in the suit. No affirmative action is asked for against the defendant or any other person. The relief prayed for is that defendant only be prohibited from doing what he has no legal right to do. Such relief is a proper subject for equity. *Ex parte Young*, 209 U. S. 123, 160 (1908); *Colorado* v. *Toll*, 268 U. S. 228 (1925); *Perkins* v. *Elg*, 307 U. S. 325 (1939); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944).

The law as announced by the lower Court is directly contrary to *United States* v. *Lee*, 106 U. S. 196; 16 Otto 171, at p. 220 (1882):

"It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor

that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

"These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his propery. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of citizen, and even his life, against the assertion of unlawful authority on the part of the executive and legislative branches of the Government. See Ex parte Milligan, 4 Wall., 2 (71 U. S., XVIII., 281), and the case of Kilbourn, discharged from the custody of the Sergeant-at-Arms of the House of Representatives by Chief Justice Cartter, Kilbourn v. Thompson, 103 U. S. 168 (XXVI., 377).

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established not only to decide upon the controverted rights of the citizens as

against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law, and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

If the lower Court's decision is to stand then a citizen of the United States is without any protection against a threatened illegal seizure of his property or invasion of his property rights by a government official acting under an unconstitutional statute or in excess of his statutory authority, if by chance the property be valid existing contracts and an indebtedness otherwise due him thereon from the United States.

This Court and the Circuit Courts of Appeals have ruled to the contrary in the following cases:

Osborn v. *Bank*, 9 Wheat. 738 (1824).
De Lima v. *Bidwell*, 182 U. S. 1 (1901).
Philadelphia Co. v. *Stimpson*, 223 U. S. 605 (1912).
Smith v. *Jackson*, 246 U. S. 388 (1918), 241 Fed. 747.
Sage v. *United States*, 250 U. S. 33 (1919).
Goltra v. *Weeks*, 271 U. S. 536 (1926).
Miguel v. *McCarl*, 291 U. S. 442 (1934).

Fox v. *Standard Oil Co.*, 294 U. S. 87 (1935).
Ickes v. *Fox*, 300 U. S. 82 (1937).
Worcester County Trust Co. v. *Riley*, 302 U. S. 292 (1937).
Brookes v. *Dewar*, 313 U. S. 354 (1941).
United States v. *Kales*, 314 U. S. 186 (1941).
Magruder v. *Association* (C. C. A. 8th), 219 F. 72 (1914).
McCarl v. *Cox* (App. D. C.) 8 F. (2d) 669; Cert. denied, 270 U. S. 652 (1925).
McCarl v. *Pence* (App. D. C.) 18 F. (2d) 809 (1927).
R. F. & P. R. Co. v. *McCarl* (App. D. C.) 62 F. (2d) 203; Cert. denied 288 U. S. 615 (1932).
Noce v. *Morgan Co.* (C. C. A. 8th) 106 F. (2d) 746 (1939).
Berger v. *Ohlson* (C. C. A. 9th) 120 F. (2d) 56 (1941).
Hammond-Knowlton v. *United States* (C. C. A. 2d) 121 F. (2d) 192; Cert. denied 314 U. S. 694 (1941).

The foregoing concedes arguendo the fact situation as assumed by the lower Court which is not correct, because when the complaint was filed the defendant threatened, as well, to seize amounts otherwise due from appellant-plaintiff's customers, and his subsequent shift of position does not defeat the then existing jurisdiction *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1 (1936) especially since this shift appears to be a plain violation of the stipulation of March 9, 1944, between the litigants. (Quoted in full at page 8 herein.)

It is respectfully urged that it is essential that defendant be enjoined from carrying out his unilateral order and from taking appellant-plaintiff's property, i. e. amounts otherwise due it from the United States or from its customers Statute Sec. 403 (c) (2), because once the defendant recovers the amounts otherwise due appellant-plaintiff,

he is required under the Renegotiation Act (403 (c)(2)(v)), to turn such amounts over to the Treasury Department as miscellaneous receipts. If this occurs, appellant-plaintiff is without a remedy because in that situation, it cannot sue the United States, and there is no provision in the statute for a refund. In this situation equity is the proper remedy. *Ohio Oil Co.* v. *Conway,* 279 U. S. 813 (1929); *Fox* v. *Standard Oil Co.,* 294 U. S. 87 (1935); *Gully* v. *Interstate Natural Gas Co.* (C. C. A. 5th) 82 F. (2d) 145; Cert. denied 298 U. S. 688 (1936); *Anniston Manufacturing Co.* v. *Davis,* (C. C. A. 5th) 87 F. (2d) 773, 779; Aff. 301 U. S. 337 (1937). In addition, interest is not recoverable—28 U. S. C. 284, *United States* v. *Goltra,* 312 U. S. 203, 207 (1941)—which establishes irreparable injury.

Educational Films Corporation of America v. *Ward,* 282 U. S. 379, 386 (footnote 2) (1931); *Hopkins* v. *Southern California Telephone Company,* 275 U. S. 393 (1928); *Proctor & Gamble Distributing Co.* v. *Sherman,* 2 F. (2d) 165, 166 (1924); *Nutt* v. *Ellerle,* 56 F. (2d) 1058, 1062 (1932). Compare *State of California* v. *Latimer,* 305 U. S. 255, 261 (1938).

The lower Court states "• • • strippeed of all its legal verbiage, and reduced to its simplest terms, it is sought to force the United States through Forrestal in his official capacity—as its officer—to perform its promise to pay". This theory is not only contrary to the facts as a casual examination of the complaint will disclose, but is also, we believe, fundamentally fallacious. This theory presupposes that the United States has refused to pay the appellant-plaintiff for goods heretofore sold and delivered to it, which is not the case, and we doubt whether anyone will seriously urge such an unmoral contention. We think it safe to assert that it is to be presumed that the United States will meet its valid obligations and certainly it is not to be presumed that the United States having hereto-

fore agreed by written contract to pay for goods sold and delivered to it will now refuse to pay. The amounts otherwise due appellant-plaintiff from the United States which the Renegotiation statute (Section 403 (c) (v)) authorizes the defendant to withhold, are not amounts which have arisen from the contracts which have been renegotiated because in this case the contracts renegotiated have been paid for long since, as this was business completed in 1941 and 1942. The amounts otherwise due arise from goods sold and delivered to the United States in 1943 and 1944, prior to the date of the defendant's unilateral order of March 4, 1944 and except for that order, so far as this record discloses, these amount would have been paid to appellant-plaintiff. In addition, we call attention to the fact that as to the contracts for the material sold and delivered, there is an express assent to be sued for these goods in the Act of March 3, 1887 as amended (28 U. S. C. A. §250).

It is also believed that the statutory provision authorizing the defendant to withhold amounts otherwise due appellant-plaintiff from the United States and appellant-plaintiff's customers is unconstitutional: *Williams* v. *United States,* 289 U. S. 553, 578 (1933); *Hines* v. *United States* (App. D. C.) 105 F. (2d) 85, 89 (1939) and *McCarl* v. *Cox,* 8 F. (2d) 669 (1925); Cert. Denied 270 U. S. 652.

These questions are present in the case at bar and are surely of grave public importance.

It is also believed that in considering any facts outside those set up in the complaint, which had to be assumed to be true (*Mosher* v. *Phoenix,* 287 U. S. 29 (1932); *Ickes* v. *Fox,* 300 U. S. 82 (1937); *Columbia Broadcasting Co.* v. *United States,* 316 U. S. 407, 414 (1942)) the Court below has acted contrary to the rulings of this Court in *Polk Company* v. *Glover,* 305 U. S. 5 (1938); *Utah Fuel Co.* v. *National Bituminous Coal Com.,* 306 U. S. 56 (1939)

and *Gibbs* v. *Buck*, 307 U. S. 66 (1939), and contrary to *Cooper* v. *O'Connor* (App. D. C. 107 F. (2d) 207 (1939); Cert. denied 308 U. S. 615; *McConville* v. *District of Columbia* (D. C. Dist. of Col.) 26 Fed. Supp. 295 (1938) and *Cohen* v. *United States* (C. C. A. 8th) 129 F. (2d) 733 (1942).

It is believed that in taking into consideration the ex parte action of defendant, a condition which arose after the filing of the complaint in determining the jurisdictional question, the Court below has acted contrary to the rulings of this Court in *Busch* v. *Jones*, 184 U. S. 598 (1902); *Camp* v. *Boyd*, 229 U. S. 530 (1913); *Dawson* v. *Distilleries & Warehouse Co.*, 255 U. S. 288 (1921); *Minneapolis R. R.* v. *Peoria R. R.*, 270 U. S. 580 (1926), and *Consolidation Coal Co.* v. *Railway Co.*, 44 F. (2d) 595 (D. C. Md.) (1930) especially since the alleged unconstitutional and unauthorized acts of the defendant have been responsible for the condition arising subsequent to the filing of the complaint—*Jones* v. *Securities and Exchange Commission, supra, Texas, etc.* v. *Northside, etc.*, 276 U. S. 475 (1928).

It is believed that in ignoring the allegations of the complaint that defendant had included in renegotiable contracts those not within the statutory provisions; the Court below has acted contrary to the ruling of this Court in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498; (1932) and cases cited supra.

It is submitted that the complaint shows beyond successful dispute that the statute here in question authorizes and the defendant has, pursuant thereto, repudiated valid existing contracts between appellant-plaintiff and the United States, and has fixed such prices for appellant-plaintiff's material previously sold as he or his subordinates, in their opinions, saw fit, and that such action is contrary to numerous decisions of this Court holding that just compensation is a judicial question and Congress

cannot, directly or indirectly, through the delegation of such power to executive officers, determine just compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893); *United States* v. *New River Collieries Co.*, 262 U. S. 341 (1923); *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931); *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349 (1936).

It is also believed that in its retroactive provisions and the defendant's action pursuant thereto, the statute here involved is unconstitutional under the ruling of this Court in *Chicago & Northwestern Rwy. Co.* v. *United States*, 104 U. S. 680 (1882); *Lynch* v. *United States*, 292 U. S. 571 (1934); *United States* v. *Bethlehem Shipbuilding Corp.*, 315 U. S. 289 (1942). It was conceded during the hearings in Congress on the statute that the retroactive features were of doubtful constitutionality. Congressional Record, 77th Congress, of April 7, 1942, vol. 88, pages 3480-3481, 3498, and 3503; April 23, 1942, vol. 88, page 3763; Congressional Record, 78th Congress, First Session, vol. 89, pp. 10247-10253; Hearings before House Committee on Naval Affairs, 78th Congress, First Session, pursuant to H. Res. 30, vol. 2, pages 518 and 1165; Senate Finance Committee Hearings on H. R. 3687, 78th Congress, First Session, page 1006; Senate Hearings on H. R. 6868 by a Subcommittee of the Committee on Appropriations, 77th Congress, Second Session, pages 28, 87-88; Senate Finance Committee Hearings on Sec. 403 of Public Law No. 528, 77th Congress, Second Session, Part I, page 37.

It is also believed that, as the statute delegates legislative and judicial functions to appointed executive and administrative officials without any standards to guide them, the statute is contrary to *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corporation* v.

United States, 295 U. S. 495 (1935); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) and *Yakus* v. *United States*, 321 U. S. 414 (1944).

If it be regarded as a super-excess profits tax statute, then the statute is plainly contrary to the Constitutional requirement that Congress shall levy taxes.

This Court in *Alma Motor Co.* v. *Timken Detroit Axle Co.*, No. 806, October Term, 1944, granted certiorari. The United States did not oppose the granting of the writ because the question of the constitutionality of the Royalty Adjustment Act of 1942 was of considerable importance.

It is also believed the case at bar discloses grounds for a declaratory judgment: *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933); *Insurance Co.* v. *Haworth*, 300 U. S. 227 (1937); *Currin* v. *Wallace*, 306 U. S. 1 (1939) and *Delno* v. *Market St. Rwy. Co.*, 124 F. (2d) 965 (C. C. A. 9th) (1942).

There are some thirty-five other cases pending in various courts (other than the Tax Court of the United States) in regard to the Renegotiation Act (Hearings before the House Committee on Ways and Means, Seventy-ninth Congress, First Session, on H. R. 2628, April 12, 1945 (unrevised) page 82). Many, if not all, of those cases involve one or more of the problems presented in this case. The decision in this case is in conflict with the decision of another three-judge statutory court in a suit by a contractor also attacking the validity of the Renegotiation Act (Lincoln Electric Company vs. Frank Knox and James V. Forrestal, Civil Action No. 21,866 in the District Court of the United States for the District of Columbia). A copy of the opinion in the Lincoln case is attached hereto as Appendix D, appendix pages 39-44.

The appellant-plaintiff appends hereto a copy of the opinions of the District Court delivered, signed, filed, and

docketed herein under date of March 15, 1945 (Appendices B and C ,appendix pages 30-38 and 38-39).

Respectfully submitted,

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Filed May 1, 1945. Charles E. Stewart, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23,387

MINE SAFETY APPLIANCES COMPANY,
Plaintiff,

v.

JAMES V. FORRESTAL,
Defendant.

STATEMENT AS TO JURISDICTION

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APPENDIX A

The 1942 Renegotiation Act as Amended

Sec. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or * * *

(omitted portions refer to so-called "war brokers")

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000, hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the

Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i) made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct; and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the sub-

contractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in

the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) * * *

(Omitted portion refers to recognition of deductions, credits, etc.)

(4) * * *

(Omitted portion refers to agreements.)

(5) * * *

(Omitted portion relates to filing of information; time for commencement of renegotiations, etc.)

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractors.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) * * *

(Omitted portion provides for Secretary obtaining information.)

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as

as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

(i) (1) the provisions of this section shall not apply to—

* * *

(Omitted portion provides for exemptions.)

(j) * * *

(Omitted portion provides exemptions to permit intermittent and temporary employees to prosecute claims against the United States.)

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

(Section 403 of the Act of April 28, 1942, the Sixth Supplemental National Defense Appropriation Act, 1942, as amended October 21, 1942, July 1, 1943 and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Title 50, Appendix 1191.) Note: The Acts approved October 21, 1942, and July 14, 1943, specifically provide that the amendments made to section 403 by those Acts shall be effective as of April 28, 1942, the date of the approval of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.)

The 1943 Renegotiation Act

Sec. 403(a) (4) (C) and (D)

* * * * * * *

(Omitted portions relate to allowances of costs and rebates.)

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor, or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other

witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under apragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Sec. 403 (i) (1) (C), (D), and (F).

* * * * * * * *

(Omitted portions relate to exemptions.)

Sec. 403 (i) (3).

* * * * * * * *

(Omitted portions relate to natural resources and increments in the value of excess inventories.)

Sec. 403 (1). This section may be cited as the "Renegotiation Act."

(Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended by Section 701 (b) of the Act of February 25, 1944 (58 Stat. 78-92) and which according to subsection (d) of said section 701 shall be "effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment"—April 28, 1942. This so-called 1943 Renegotiation Act—without the so-called 1942 Renegotiation Act—may be found in Title 50 of the United States Code Annotated Appendix, Section 1191, 1944 cumulative annual Pocket Part.)

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23,387

Filed Mar. 15, 1945. Charles E. Stewart, Clerk

MINE SAFETY APPLIANCES COMPANY, Plaintiff,

vs.

FRANK KNOX, JAMES V. FORRESTAL, Defendants

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and McGuire, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court

McGUIRE, J.:

The plaintiff Mine Safety Appliance Company is a corporation engaged in the manufacturing, selling, exporting and

installing throughout the United States and elsewhere, mining and industrial equipment and protective apparatus for the protection of life and property.

For several years past the company, both as a prime contractor and as a sub-contractor has secured so-called war contracts, presumably subject to the provisions of the Renegotiation Act. 50 U. S. C. A. Appendix §1191.

On March 4, 1944, the defendant Forrestal as Under Secretary of the Navy, acting under authority of the Act made a unilateral order requiring the company to eliminate excessive profits for its fiscal years ending December 31, 1941, and December 31, 1942. The order provided in part as follows: "Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits * * * by directing the withholding of amounts otherwise due to you as a contractor * * *."

The plaintiff company failed and refused to comply with the order and on March 8, 1944, filed the complaint herein which prayed for an injunction to restrain the defendant from:

"(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof;

(2) Instructing or requesting any prime contractor or subcontractor or officer, employee or agent thereof, to withhold any monies due or to become due to plaintiff from such prime contractor;

(3) From further proceeding in any manner to renegotiate or refix contract prices with respect to materials and supplies furnished or to be furnished by plaintiff;

(4) From proceeding in any manner directly or indirectly, to enforce or attempt to enforce the determination and order of March 4, 1944, whether by

methods of enforcement sought to be provided by said Renegotiation Act, or by any other method."

The complaint further prayed that a special court of three judges be constituted and that upon final hearing the court order, adjudge and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against the plaintiff.

After the complaint had been served the parties entered into a stipulation as follows: "Defendants will cause the Navy Department to suspend payment, pending final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to the plaintiff * * * up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department) for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944 * * * Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

(2) In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular no action to enforce the terms of said determination of March 4, 1944 * * *.

(3) Plaintiffs will not apply to the court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort * * *.

(4) By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

Thereafter the Navy Department suspended payment to the plaintiff on vouchers submitted with respect to contracts

performed by *the company*, and which were otherwise payable, in the amount of $1,014,873.78 which sum is being held as an obligated but unexpended balance in the particular appropriation account of the Navy Department applicable to the various accounts of the plaintiff. The practical effect of this is that the total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by any other department or agency.

The statutory court of three judges having been convened as prayed for the defendant moved to dismiss the complaint on jurisdictional grounds and our determination herein is upon that motion.

Immediately *in limine* we are confronted with the initial and controlling inquiry as to whether this is in fact a suit against the United States.

If it is, or if their interests are substantially affected, then the suit fails for it is basic law that the sovereign cannot be sued without its consent.

U. S. ex rel. Goldberg v. Daniels, 231 U. S. 218, 34 S. Ct. 84, 58 L. Ed. 191.

This prohibition rests upon sound and cogent reasons of public policy, and is embedded deeply in the common law.

The United States cannot be subjected to legal proceedings of any character without their consent; and whoever institutes such proceedings *must* bring his case within the authority of some act of Congress.

United States v. Clarke, 8 Pet. 436, 8 L. Ed. 1001.
Lynch v. U. S., 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.
The Siren, 7 Wall, 152, 19 L. Ed. 129.

Again it has been held and now is settled definitely that if the United States is not a formal party defendant—if their interests are so *directly* involved that they are actually the real party in interest and any relief or judgment that might be granted or entered will operate against them,—they are by nature of this fact an indispensable party and the suit as a consequence must fail, for you cannot do by indirection what you are forbidden to do directly.

Morrison v. Work, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394

Wells v. Roper, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755

International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134

Belknap v. Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599

In re Ayers, 123 U. S. 443, 502, 8 S. Ct. 164, 181, 31 L. Ed. 216.

It is equally well established that if an indispensable party is not joined the suit will be dismissed.

Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068

Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411

Is this suit here, therefore, in essence one against the defendant Forrestal, or is he actually only the nominal party and the interests to be directly affected by granting of the relief prayed for, those of the United States?

If they are, then the courts have no jurisdiction, unless by the authority of Congress they have been accorded such.

The question is most certainly, not a new one, but the line of demarcation is not easily drawn, and its repeated litigation has not served the purpose of clarification any too well.

Early in our law Chief Justice Marshall laid down the doctrine that the question as to whether a suit is against the sovereign ((State)—and as a consequence within the prohibition of the Eleventh Amendment)—is to be determined by the nominal parties of record.

Osborn v. Bank of United States, 9 Wheat, 738, 857, 6 L. Ed. 204

If that were the law today it would be determinative of the matter here. But while that case is still the law of the land in other respects, it is now finally settled the courts will look behind the designation of parties on the record and seek to determine who are the *real* parties to the litigation.

New Hampshire v. Louisiana and New York v. Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656

Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 46 L. Ed. 954

In re Ayers *supra*

Ford Motor Company v. Department of Treasury (Sup. Ct. of U. S. #75 Oct. Term 1944, decided January 8, 1945) 89 L. Ed. 372, 376.

And it makes no difference whether it is contended a State or the United States is or is not involved, the principle, in essence, is the same.

In litigation involving this principle two classes of cases have arisen.

Pennoyer v. McConnaughy, 140 U. S. 1, 8, 9, 10, 11 S. Ct. 699, 35 L. Ed. 363.

The *first*, in which the action is brought against the officers of the sovereign representing *its* action and *liability*, thus making *it* though not a party of record, the real party against whom the judgment sought will function and operate so as to compel *it* to perform *its* contract, or respond to *its* other obligations.

In re Ayers, *supra*

Hagood v. Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. Ed. 805

Louisiana v. Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448

The *second*, in which there is an invasion of a *legal* right, either on the part of the Government, or an officer of it, acting either under color of an unconstitutional statute, or in excess of the power validly conferred by a constitutional one.

It is to be noted however, that the right invaded must be a *legal* one "* * * one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege * * *."

Tennessee Power Co. v. T. V. A., 306 U. S. 118, 137, 138, 59 S. Ct. 366, 83 L. Ed. 543.

What is the right sought to be enforced here?

It certainly is not one of property; the complainant has no right to *the monies* appropriated by Congress for the Navy Department.

There most certainly is no *tortious* invasion of any *right* of the complainant by the defendant Forrestal, nor is there any right arising out of any privilege conferred by statute.

And if, *arguendo*, it is urged that the complainant's case is bottomed on a right arising out of contract—what is the nature of the relief sought?

Stripped of all legal verbiage, and reduced to its simplest terms, it is sought to force the United States, through Forrestal in his official capacity—as its officer—to perform *its* promise to pay.[1]

The defendant Forrestal has no personal interest in the matter and no official authority to grant the relief asked. We conclude therefore, that the United States is the real party in interest, for against it only would a decree be operative, and the suit thus being in substance one against the sovereign, this court has no jurisdiction.

The United States and they alone are to be affected by the relief here sought. The suit therefore in substance is one against the United States,

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[1] Wherefore plaintiff prays:

(a) That this Honorable Court issue forthwith its temporary restraining order against defendants and each of them, their agents, assistants, deputies and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them until the further order of the Court, from

(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof

* * * * * * *

(c) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(d) That upon final hearing of this cause the interlocutory injunction herein prayed for be made permanent;

* * * * * * *

In re Ayers, *supra*

nd can be distinguished from those cases in which a defi-
ite right of the complainant has been invaded by the act
f the officer in question.

Where the action in fact is one for the recovery of money
rom the sovereign, the latter "* * * is the real, sub-
tantial party in interest and is entitled to invoke its sov-
reign immunity from suit, even though individual officials
re nominal defendants."

Ford Motor Co. v. Dept. of Treasury *supra.*

The cases cited by the complainant in support of its
heory that the United States is not a necessary party,
an all be distinguished, in that they either are not apposite
r fall within the second category referred to above.

Tennessee Power Co. v. T. V. A. supra

Again, a fortiori, "* * * the right to proceed against
ndividual, even though an officer, to prevent a violation
f the Constitution did not include the right to *disregard*
italics supplied) the Constitution by awarding relief which
ould not rightfully be granted without *impleading* (italics
upplied) the United States * * *."

Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, 40,
38 S. Ct. 271, 62 L. Ed. 560.

The United States is a necessary party here for the decree
ought would compel the payment of money out of the
reasury of the United States[2]; or compel the sovereign
o perform specifically its contract.[3] For if the plaintiff
ere to prevail the defendant Forrestal would be compelled
o pay money out of the Treasury, the decree thus in effect
ompelling specific performance on the part of the Govern-
ent of *its contract*. Thus, the United States is a necessary
arty, and the suit is as a consequence, one against the

[2] Haskins Bros. & Co. v. Morgenthau, 66 App. D. C. 178, 181, 85 F[2]
7, 680, *cert. denied* 299 U. S. 588; Cummings v. Hardee, 70 App. D. C.
, 21, 102 F[2] 622, 625.

[3] United States ex rel. Shoshone Irr. Dist. v. Ickes, 63 App. D. C. 167,
9, 70 F[2] 771, 773, and cases cited.

United States and one over which this court has no jurisdiction.

We are not unmindful of the decision of a similar statutory court in this jurisdiction in Lincoln Electric Co. v. Knox, 56 Fed. Supp. 308. It is to be noted however, in that case that the court said "* * * the right of the United States to withhold money owing to Lincoln is unaffected by anything which is asked for here * * *." And there is no claim here that the defendant Forrestal (Knox) has the right to interfere with the contractual relationship existing between the complainant and its customers.

The present case can be distinguished further from the Lincoln case supra, in that, as has been indicated, the relief here sought would compel the payment of money out of the Treasury, which of course demands as a prerequisite that the United States be made a formal party.

Disposing thus as we must, and have, of the jurisdictional question *in limine* raised, relative to the others we express perforce no opinion.

Motion to dismiss granted. Counsel will prepare proper order.

(Signed) MATTHEW F. McGUIRE.
I concur (Signed) JUSTIN MILLER.
3/15/45.

APPENDIX C

[Stamp:] Filed May 1, 1945. Charles E. Stewart, Clerk.

C. A. 23387

Mine Safety Appliances Company

v.

James V. Forrestal

BAILEY, J.:

Inasmuch as the defendant has filed an affidavit stating that he has suspended payment of a sufficient amount of money to cover the full amount of net refund due under

ne Renegotiation Act and that there is no possibility that t any time in the future he will or can proceed to collect, y withholding or otherwise, any further sum from plain- iff on amount of excess profits realized during its fiscal ears 1941 and 1942, the right of the defendant to prevent r endeavor to prevent any prime contractor or subcon- ractor of the plaintiff from paying any sums due to the laintiff is not involved in this suit.

Apart from this question, the action is one in which the nited States is a necessary party and I concur in the pinion that this Court is without jurisdiction for that eason.

(Signed) JENNINGS BAILEY.
I concur (Signed) JUSTIN MILLER.
I concur (Signed) MATTHEW F. MCGUIRE.
3/15/45.

APPENDIX D

Copy

Stamp:] Filed May 1, 1945. Charles E. Stewart, Clerk

N THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

(Holding a Three-Judge Statutory Court)

Civil Action No. 21,886

LINCOLN ELECTRIC COMPANY, *Plaintiff*,

v.

FRANK KNOX, JAMES V. FORRESTAL, *Defendants*

Decided July —, 1944

Before Groner, Circuit Judge, and Bailey and Goldsborough, District Judges

Memorandum Opinion

The case is now before us on a motion by defendants for ummary judgment. The complaint of Lincoln Electric ompany against Secretary Knox and Under-Secretary

Forrestal was filed in this Court November 3, 1943. The main purpose was to obtain a decree that the Renegotiation Act in its form prior to the amendments of February 25, 1944, is unconstitutional and unenforceable. Defendants answered January 20, 1944, denying unconstitutionality and setting up various other defenses. Subsequently the present motion was filed, in which the position of the defendants, shortly stated, is that the Court lacks jurisdiction because the suit is in legal effect against the United States, which have not consented to be sued, and that the plaintiff has available to it adequate legal and administrative remedies.

Plaintiff is engaged in the manufacture and sale of electric equipment. The greater portion of its business is with customers scattered throughout the United States. The portion directly with the Departments of the United States is said to be less than 8% of the whole. The period here involved is the year ending December 31, 1942. Acting under the Renegotiation statute,[4] defendants called on plaintiff for certain information in relation to its operations and sales for the year in question, and as a result of the examination of the data furnished, determined that plaintiff had realized "excessive" profits of more than $3,000,000, and notified it that unless action were taken prior to November 5, 1943, in making proper restitution, defendants would direct the withholding of amounts due plaintiff by the Government and would likewise direct the withholding by plaintiff's customers of so much as might be due to plaintiff by them.

Defendants subsequently—that is to say, in January, 1944, long after the suit was filed—withdrew their threat to seize funds due plaintiff by its customers, and thereafter relied for restitution upon the seizure of sums due by the United States. But as to this plaintiff says that its rights to relief accrued as of the facts existing when the suit was brought and that the subsequent modification of the threat will not avail, since defendants may again change their minds, as

[4] Act, Apr. 28, 1942, C. 247, Title IV, § 403, 56 Stat. 245, 50 U. S. C. A. App. § 1191.

ey have the right to do under the appropriate act. This rings us, then, for present purposes, to consider (1), hether the suit is necessarily against the United States, nd if it is not, (2), whether Congress has otherwise pro-ided an adequate remedy in the amendment of 1944, au-horizing redetermination in a proceeding in the Tax Court.

We are not unmindful of the difficulty of stating an exact ormula for determining when a suit against an officer is a uit the United States. (*Brooks* v. *Dewar*, 313 U. S. 354, 59). But where the relief asked is that the officer be re-trained from acting to enforce an unconstitutional law in uch a way as to injure the property rights of the plaintiff, he proceeding is one against the officer. The single excep-on is the situation in which the United States, because of he nature of the decree to be issued, are indispensable arties to the suit. If, for example, the object is to com-el specific performance of a contract between the United tates and the plaintiff, or to compel an officer to pay money ut of the Treasury or otherwise to hand over to the plain-ff property which the United States claim to own, or to revent the United States from using property which they wn, or claim to own,—in all these cases the United States re the real parties in interest and the suit must fail. But he effect of an injunction in this case would not be to com-el specific performance of a Government contract or pay-ent of money out of the Treasury. The injunction would mply prevent a Government official from acting under n unconstitutional statute (if it should be found to be uch), so as to interfere with valid contract relations be-ween Lincoln and its customers. Whether the contracts ill eventually be performed, and whether the money will e paid to Lincoln, depends upon many other circumstances hich are not involved in the present action, and the right f the United States to withhold money owing to Lincoln unaffected by anything which is asked for here.

If this is a correct statement of the case we have, then would seem to follow that the suit is not against the nited States and the doctrine announced in *Ex parte oung*, 209 U. S. 123, would be controlling. At page 159 he Supreme Court said:

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

And see *U. S.* v. *Lee*, 106 U. S. 196; *Phila Co.* v. *Stimson* (1912), 223 U. S. 605; *Thompson* v. *Deal*, 67 App. D. C. 327, 92 F. (2d) 478; *Ickes* v. *Fox* (1937), 300 U. S. 82; *Tenn. Electric Power Co.* v. *Tenn. Valley Authority* (1939), 306 U. S. 118; *Lane* v. *Watts* (1914), 234 U. S. 525, 540; *Goltra* v. *Weeks* (1926), 271 U. S. 536; *Franklin Township* v. *Tugwell* (1936), 66 App. D. C. 42, 85 F. (2d) 208.

Nor do we think plaintiff has elsewhere and otherwise an adequate remedy. The right to go to the Tax Court did not accrue until long after this suit was instituted and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought. *Dawson* v. *Ky. Dis. & W. Co.*, 255 U. S. 288. Nor is the right to sue the United States in the Court of Claims in the circumstances of this case an adequate remedy; for there is no such right there as to plaintiff's thousands of customers who necessarily would have to be sued separately and where they reside.

Plaintiff brought this suit in the only court having jurisdiction of the persons of the defendants. The controversy, as we have mentioned briefly, grows out of an Act of Congress designed to protect the United States against losses

hrough improvident contracts made by officers of the Gov-rnment in the war effort. Plaintiff insists that this legis-ation, as applied to the facts of this case, is unconstitu-ional, in that it is repugnant to Article I, Section 1, and Article I, Section 8, of the Constitution, and likewise re-ugnant to the Fifth and Tenth Amendments to the Con-titution; that in the year in question all contracts made y it for the sale and disposition of its products were made pon the basis of fixed and staple prices, as to which there ere no increases as the result of the war, and that in ccepting orders from its customers, the same were taken pon an express agreement that there should be no re-djustment or renegotiation of prices. Plaintiff further harges that if the Secretary is permitted to renegotiate ts contract, not only with the United States, but with its arious customers, who in turn have contracted with the nited States, the result would be to seriously impair its inancial structure and would otherwise irreparably injure ts capacity to cooperate successfully.

Defendants insist that, notwithstanding this and grant-ng also that the Act of Congress is unconstitutional, plain-iff has no other recourse than to challenge the claimed ight of the Government in the Tax Court or in the Court f Claims.

We think this is not sufficient. In our opinion the case hould be tried on the merits and plaintiff given the oppor-unity of proving its case, and the question of the consti-utionality of the Act of Congress should be briefed and rgued. The rule for summary judgment was, in our opin-on, never intended to throw upon the court the burden of etermining a case involving, on the one hand, a delicate uestion of law and, on the other, complicated and con-roverted facts, without an adequate and proper hearing. f the Renegotiation Act is in all respects valid, obviously, laintiff has no case. If, on the other hand, it is invalid, nd the Government, as we have indicated, is not an essen-ial party, then, clearly, plaintiff ought not to be stopped t the threshold of the court and told to seek relief in some ther court and in some other manner obviously inadequate nd incomplete.

There is another pending case in this court involving this identical question, which is set for hearing October 2, 1944. The instant case is accordingly set down for hearing on Monday, October 9th, 1944, at 10:30 o'clock A. M., on the merits and the motion for summary judgment is denied, and an appropriate order will be entered accordingly.

(Signed) D. Lawrence Groner.
(Signed) Jennings Bailey.
(Signed) T. Alan Goldsborough.

(8445)